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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-901

MR. ANDREW WOODS, Petitioner,

v.

SAFEWAY STORES, INC., Respondent.

BRIEF FOR NATIONAL BLACK VETERANS ORGANIZATION, AMICUS CURIAE

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MOTION OF NATIONAL BLACK VETERANS ORGANIZATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Black Veterans Organization (NBVO) hereby moves, pursuant to Rule 42 of this Court, for leave to file

the attached brief as amicus curiae, in support of the petition for a writ of certiorari. Petitioner has consented to the filing of this brief, but respondent has denied such consent.

The National Black Veterans Organization is a non-profit association organized in 1976 to promote the common interests of Black veterans and the general public in the development and implementation of non-discriminatory employment practices within the Armed Forces of the United States and the elimination of artificial barriers to the employment of Black veterans. Many Black veterans and servicemen have pseudofolliculitis barbae.

NBVO's interest in this particular case is two-fold. First, the lower court's decision jeopardizes the

continued employment of many Black veterans. Second, the decision encourages the Armed Forces to retreat from its recent change in the treatment of Black servicemen with pseudofolliculitis barbae.

If the lower court's decision is not reversed, Black veterans afflicted by PFB may be required to disobey their doctor's advice or forfeit their livelihoods and the Armed Forces may reverse its position and refuse to allow military dermatologists to prescribe beard therapy for PFB. The lower court's interpretation of the "business necessity" doctrine in this case affects not only the individual in this case, but many Black servicemen and veterans.

The petition necessarily concentrates on the specific facts in this case. NBVO's brief will elucidate its perception of the lower court's misplaced reliance on grooming cases for its rationale that a legitimate business purpose permits racial discrimination. NBVO's brief will also discuss the social policy implications of this case.

We believe that our perspective will assist the Court in reaching a decision on the petition. Accordingly, NBVO respectfully requests that the Court permit our brief as amicus curiae to be filed and considered.

Respectfully submitted,

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BRIEF FOR NATIONAL BLACK VETERANS ORGANIZATION, AMICUS CURIAE

INTRODUCTION

The interest of the National Black Veterans Organization (NBVO) has been stated in the foregoing motion, and

therefore will not be repeated here.

SUMMARY OF ARGUMENT

This case involves much more than the individual petitioner, Mr. Andrew Woods, and the individual respondent, Safeway Stores, Inc. This case is of singular importance because it involves a substantial departure from this Court's holding in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

The national policy of equal employment opportunity, as embodied in Title VII, mandates that race not be a factor in employment decisions. This Court has interpreted Title VII to permit an employment practice or policy which operates in a discriminatory manner to stand if it is shown to be a business necessity. Griggs v. Duke Power Co., supra, at 431. In Griggs, this Court stated that "...The touchstone is business necessity. If an employment practice cannot be shown to be related to job performance, the practice is prohibited", 401 U.S. at 431, and that "what is referred by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of race or other impermissible classification."

In the case now before this Court, the District Court and Court of Appeals for the Fourth Circuit have held that when an employer has a grooming regulation that operates invidiously to exclude a Black man, that rule and its discriminatory effect are permissible, because the employer has a reasonable

"business purpose" for the regulation. As a result of this decision, the Griggs "business necessity" rule does not apply in the Fourth Circuit when the employer has a legitimate business purpose for a racially discriminatory regulation. The elements of the "business necessity" doctrine are seriously diluted by the court below since Safeway failed to produce any evidence that its refusal to exempt Mr. Woods from its grooming regulation was necessary for the safe and efficient operation of its business.

The National Black Veterans Organization believes that this Court should grant the writ requested in order to precisely enunciate and reaffirm the "business necessity" test. The lower court's reaction to Dr. Watkins' treatment of this medical condition in this

case threatens the employability of PFB victims and the economic stability of their families. Reversal of the lower court would encourage fair and humane treatment of PFB victims.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN GRIGGS v. DUKE POWER CO., SUPRA AND TRANSWORLD AIRLINES, INC. v. HARDISON, 432 U.S. 63 (1977) AND PERMITS AN EMPLOYER TO DISCRIMINATE ON THE BASIS OF RACE WITHOUT DEMONSTRATING THAT ITS PRACTICE IS MANDATED BY "BUSINESS NECESSITY."

A. Title VII Has Been Interpreted To Prohibit Artificial, Arbitrary, And Unnecessary Barriers To Employment When Such Barriers Operate Invidiously To Discriminate On The Basis Of Race.

Title VII on its face prohibits discrimination in employment based on race, color, religion, sex or national origin. However, this Court in Griggs v. Duke

Power Co., supra, held that an employment practice that operates in a discriminatory manner would be allowed to stand only if it is shown to be related to job performance and is necessary. The "business necessity" standard was developed to ascertain in what extremely limited situations a discriminatory practice would be permitted to stand. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Lower federal courts, in interpreting this Court's decisions in Griggs and Albemarle regarding what is a "business necessity", have stated "...Necessity connotes an irresistible demand", United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971); a racially discriminatory seniority system must be tested by compelling business necessity

and not the less strict standard of business purpose, U.S. v. H.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); sex bias is permissible only when the "essence of business operation" would be undermined, Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971); high degree of economic and human risks justifies policy with adverse racial impact, Spurlock v. United Airlines, Inc., 475 F.2d 215 (10th Cir. 1972). These cases demonstrate that the business necessity doctrine normally involves consideration of safety or other issues going to the heart of the operation of the business.

The trial court and appellate court in the instant case correctly found that appellee's no-beard policy did act to discriminate against appellant because

of his race. They also correctly concluded that Title VII has been interpreted to prohibit employment practices that may be neutral on their face but have a disparate impact on members of a distinct racial group if the practice cannot be justified by a proven business necessity, citing, Robinson v. Lorillard, 444 F.2d 791 (4th Cir. 1971).

B. The Court Below Committed Serious Error When It Failed To Apply The Business Necessity Test To Respondent's Treatment Of Petitioner And Condoned The Racially Discriminatory Practice.

The lower court committed serious error by holding that the discriminatory impact of the no-beard regulation did not violate Title VII. In reaching its conclusion, the trial court cited a number of cases that affirmed the right

of an employer to maintain grooming standards.[1/]

It should be noted that both Griggs and Robinson directed their attention to racial discrimination. By contrast, in all the grooming code decisions cited by the trial court, except one, individuals alleged that they were the victims of unlawful sex discrimination. The business necessity doctrine articulated in Robinson was never applied to any of the cases cited above. However, Griggs was used by several circuit courts to

1/ Brown v. D.C. Transit System, Inc., 523 F.2d 725 (D.C. Cir. 1975); Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (en banc); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1972); Boyce v. Safeway Stores, Inc., 351 F.Supp. 402 (D.D.C. 1972); Baker v. California Land Title Co., 349 F.Supp. 235 (C.D. Calif. 1972).

assert the right of an employer to maintain grooming standards. 2/

These opinions cited to the following Griggs passage:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 3/

2/ Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973).

3/ Id. citing Griggs, 401 U.S. 424, 429-430, 91 S.Ct. 849, 853.

These cases ignored Griggs' analysis of the business necessity doctrine and used much of the above passage to argue that 1) grooming requirements which have no significant effect upon the employment opportunity afforded one sex in favor of the other was outside the prescription of the Civil Rights Act; and 2) distinctions in employment practices between men and women on the basis of something other than immutable characteristics or legally protected rights do not inhibit employment opportunities in violation of the Civil Rights Act.

In addition, the courts uniformly said they would not consider the "bona fide occupational qualification," pursuant to 42 U.S.C. §2000e-2(e)(1) because dress and grooming policies did not

unlawfully discriminate on the basis of sex.[4/] The Boyce and Fagan cases have set the tone for the grooming cases. The cases, dealing primarily with alleged sex discrimination, have presented their own "business analysis" standard. In Boyce, for example, Judge Gesell found that "no substantive issue [was] presented;" that there were grooming standards for female and male employees.[5/] The concern of most of these decisions went to whether there were distinct employment opportunity disadvantages for one sex due to outmoded and unjustifiable sex stereotypes.[6/]

4/ See, e.g., Willingham, supra, 507 F.2d at 1088, Baker, supra, 507 F.2d at 898; Fagan, supra, 481 F.2d at 1123-1126; Dodge, supra, 448 F.2d at 1335.

5/ 351 F.Supp. 402

6/ Id.

In most decisions, the courts felt that a grooming code did not conform to this analysis. The courts' feelings are best summarized in the following passage:

> "Perhaps no facet of business life is more important than a company's place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance. Good grooming regulations reflect a company's policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility. Congress has said that no exercise of that responsibility may result in discriminatory deprivation of equal opportunity because of immutable race, national origin, color, or sex classification." 7/

7/ Fagan, supra, 431 F.2d at 1124.

Unlike the grooming cases discussed above, the case at bar does involve an issue of immutability. For example, in Baker, the Court of Appeals concluded that this Court's decision in Griggs....

> "was not talking in terms of hair styles or modes of dress over which the job applicant has complete control. The Court was addressing itself to characteristics which the applicant, otherwise qualified had no power to alter." 507 F.2d 895, at 897.

The common theme in all of the grooming cases cited by the court in Woods is that (1) hiring policies that distinguish between men and women on a ground related to choice are permissible; (2) Title VII does not prohibit an employer from promulgating rules of employment where the direct economic effect upon the employee is nominal or non-existent; (3) Title VII proscribes employer rules and

regulations that limit or prevent employment of individuals because of an immutable characteristic. Mr. Woods has an immutable characteristic that cannot be changed subject to what courts feel is personal preference or the whim of fashion. Thus, his case falls outside the category of grooming cases which have alleged sex discrimination.

Mr. Woods' situation poses a new category of grooming cases falling under the category of race discrimination because of an immutable condition that the trial court has recognized as being peculiar to the black race.[8/] The trial transcript clearly demonstrates that appellant did try to conform to the rules

8/ Woods Trial Court opinion, 12.

of his employer. Only after his physician advised of the nature and extent of his condition and the only curative course of treatment presently known to medical science, did Mr. Woods have any choice in the matter; between pain, disfigurement, and a more unsightly appearance, and a job as a stock clerk at a Safeway store. Hence his decision was based on a medical necessity and not whim or caprice.

Although the trial court acknowledged that "the statute has been interpreted to prohibit even racially neutral employment practices if the same has a significantly disparate impact on members of a distinct racial group and if they cannot be justified by proven business necessity,"[9/] it did not invoke the

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9/ Id. 13

standard articulated in Robinson. Rather, the court simply allowed the assertion that the "image of cleanliness was necessary to attract and retain customers" and the proposition that the defendant exercised "sound business judgment" in concluding that a "no-beard" rule was a necessary part of its grooming code. Without substantiation, the trial court concluded that this was a legitimate business decision "reflecting on the local clientele." Little import was given to the fact that other Safeway divisions or Safeway stores within the area of the store itself do not require such a grooming restriction. The argument the District Court as it was affirmed by the Court of Appeals flies in the very face of the concerns of Congress as expressed in the Griggs and

Robinson opinions. Moreover, in Diaz v. Pan American, supra,[10/] the 5th Circuit held that mere customer preference would not justify continuation of a discriminatory hiring policy in favor of women.

It is clear to Amicus that the court below has seriously cut into the "business necessity" standard that is to be used to justify a racially discriminatory business practice. By merely citing Robinson as the basis for its decision, but relying more on the less stringent analyses of the grooming cases, the court below has permitted form to triumph over essence; that is a reasonable or legitimate grooming regulation to supersede Title VII's prohibition against employment practice barriers that operate to exclude and discriminate based on race.

10/ 442 F.2d 385 (5th Cir. 1971)

C. The Court Below Incorrectly Justified The Discriminatory Regulation Because The Appellant Was The Only Black Employee Discharged.

The District Court judge stated that the impact of discharging one man with PFB is negligible since it affects only one Black. On the other hand, it is highly improbable that one individual can minimize the store's ability to sell its products. The fact that only one individual is affected by this employment practice does not negate the fact that this practice is illegal. That reasoning of the court below is inconsistent with this Court's statements in McDonald v. Santa Fe Trail Transp. Co., 423 U.S. 9231 (1976), that Title VII applies to isolated cases of discrimination as

vigorously as in class action cases.

II. PFB IS AN IMMUTABLE CHARACTERISTIC PECULIAR TO MEMBERS OF THE BLACK RACE AND THEREFORE, ANY DISCRIMINATION BASED ON THE ONLY KNOWN EFFECTIVE TREATMENT FOR SEVERE CASES OF PFB, WHICH IS THE GROWING OF A BEARD, DESERVES PROTECTION.

A. PFB is a Very Common Skin Condition Among Black Men Who Shave Regularly

PFB is a skin condition that is caused by the tips of curly or kinky facial hairs penetrating into the skin and causing an inflammatory reaction. The disorder appears almost exclusively in Black men because of the fact that Blacks have curved hair follicles, unlike Whites, whose hair follicles are straight. PFB is a purely mechanical condition, not one caused by a particular chemical or hormonal imbalance, but rather by the curved hair follicles which after shaving cause the already curly

hair to curve back into contact with the skin surface, pierce and reenter the skin; creating a pseudofollicle. The initial flammatory reaction or lesion produced at the site of the reentry of the hair are called papules or razor bumps. The reaction is similar to that caused by a foreign body (splinter) entering the skin. Unless the disorder is properly treated, scarring and permanent disfigurement can be caused by PFB, depending on the severity of the condition. In all cases, a cessation of shaving will cure and prevent recurrence of the disorder; whereas regular shaving will exacerbate the condition. In some cases, the hair follicles curve into the facial tissue without even growing above the skin line.

Shaving abstenance cures and prevents the disorder because when the tip of an

embedded hair penetrates to a certain depth, the facial tissues resist and prevent further penetration. If the beard is not shaved and continued to grow, the external portion of the hair forms an increasing loop (one end pseudofollicle, the other end the true follicle) which acts like a spring that exerts force and pulls the embedded tip of the hair out of the skin. Once the embedded hairs have been dislodged, the papules or razor bumps begin to heal.

Several medical studies have concluded that 45%-80%[11/] of all Black men, usually young males, suffer from PFB. Many cases of PBF are not so severe as

11/ A.M. Alexander, M.D. and W.I. Delph, M.D., Pseudofolliculitis in the Military, Journal of the National Medical Association, Vol. 66, No. 6, page 459, November 19, 1974.

to require shaving abstinence for treatment. However, a significant number are diagnosed as moderate to severe. Even in those instances where PFB has not been diagnosed as moderate to severe, if a victim is prone to keloids, (which is excessive scarring) simple papules or razor bumps can lead to the development of disfiguring scars. Thus, in those instances where a sufferer has mild PFB but is prone to keloidal scarring, an effective treatment to prevent such scarring is the growth of a beard.

B. Unless Certiorari is Granted Bad Social Policy Regarding PFB Will Be Instituted

The wearing of a beard causes different responses in people and institutions. Many attitudes are the result of personal preference, social

mores or as in this case, regulations developed by an employer. The impact of attitudes and policies on the individual with a beard can range from admiration to complete rejection or termination from employment. In recognizing PFB, the Army, Air Force and Marine Corps have promulgated regulations[12/] for the administrative and medical management of the condition. In all cases, these branches of the military have as the rule that all individuals must be clean shaven and permits the wearing of a beard only if there is a confirmed diagnosis of PFB. It should be noted that the Navy instituted a rule that permits any member to wear a beard if they so choose.

12/ See Army Regulation MD.40-41, 18 April 1972; Air Force Manual 35-10, 1 December 1972; Marine Corps Order 6310.1, 9 July 1975; Air Force Pamphlet 160-44, 22 August 1977.

Prior to the development of such regulations, a service man with PFB was often administratively discharged with a less than fully honorable discharge, harrassed, often became the victim of racial insults, suffered administrative discipline and courts martial. With the increased awareness of PFB and the fact that it is caused by curved hair follicles and curly facial hair, and not poor shaving practices, there is a more enlightened attitude on PFB in the military. This is not to say that the Black PFB victim in the military is now free from all stigmas, but present military policies and practices are more sensitive to PFB than Safeway.

It almost goes without saying that decisions of the Supreme Court, in addition to establishing the law of the

land, set social policies.[13/] Presently, there is no law, other than the 4th Circuit's decision, on the issue of PFB. If the lower courts' decisions are allowed to stand unchallenged, then employers and others can reasonably believe that discrimination against PFB sufferers is permissible.

In most instances people wear beards because of their personal preference. As result thereof, they may be forced to choose between a number of things society has to offer and their beard. Presently, there is no constitutional or statutory right protecting a person who voluntarily grows a beard to be free from demands by employers and

13/ Such was the case in Dred Scott v. Sanford, 19 How. 393 (1857), Plessy v. Furgeson and Brown v. Board of Education, 347 U.S. 483 (1954)

others regarding their beards. However, NBVO asserts that PFB sufferers should and do have statutory rights not to be put in the position of choosing between their health or economic well being.

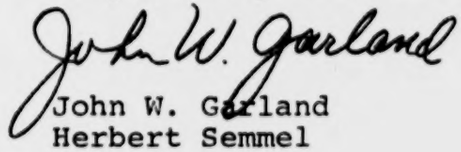
Congress, in its deliberations over Title VII was acutely aware of the dismal national employment records of Blacks. It would indeed be against the purpose of the statute to permit discrimination against those Black men with PFB who must wear beards. It is the disproportionate predisposition of Blacks to PFB that gives rise to the grave social implications of this case.

CONCLUSION

Amicus file this brief to urge the Court to grant Certiorari and reverse the judgment of the Court of Appeals

and District Court below with instructions to the District Court to enter judgment for the petitioner.

Respectfully submitted,



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